

BEFORE THE INDIANA CIVIL RIGHTS COMMISSION
311 West Washington Street
Indianapolis, Indiana 46204

STATE OF INDIANA)
) SS
COUNTY OF MARION)

CHARLEY EPPERSON,
Complainant,

DOCKET NO. 06872, TINS-1216

v.

JAY'S FOODS, INC.,
Respondent.

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER

The undersigned Hearing Officer was appointed to hear the above-captioned case and both parties were notified of said appointment by personal service on their attorneys prior to the commencement of the hearing held on May 24, 1979.

Complainant Charley Epperson (hereinafter "Epperson") was present at said hearing and was represented by counsel, Mr. Robert D. Lange and Ms. Tuke. Respondent Jay's Foods, Inc., (hereinafter "Jay's") was represented by counsel, Mr. Bernard M. Kaplan and Mr. Dennis Delman.

Having considered the official record, including the Stipulations of Fact between the parties, the ruling by then-presiding officer John C. Carvey that certain facts be deemed established, the evidence admitted at the hearing, the arguments of counsel, and being duly advised in the premises, the Hearing Officer hereby recommends the entry of the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Epperson is a Negro citizen of the State of Indiana. (The term "Black" will hereinafter be used, and is intended to be synonymous with "Negro").

2. Jay's is a corporation doing business in the State of Indiana, engaged in the manufacture and distribution of potato chips and related products.
3. Jay's has employed six (6) or more employees for wages or salary at all times relevant to this complaint.
4. Epperson was hired by Jay's on March 24, 1975 as a driver-salesman at its Valparaiso branch and was assigned to the Gary/Black Oak area.
5. Epperson was the first black to be employed by the Valparaiso branch of Jay's in the Black Oak area.
6. The individual who decided to hire Epperson was Mr. Richard ("Dick") Kratzenburg (hereinafter "Kratzenburg"), who was the Valparaiso Branch Manager, and had actual authority in relation to all employment matters, including hiring, training, and termination.
7. Kratzenburg advised Epperson that there would be training period of two (2) or three (3) weeks.
8. The job of a driver-salesman was to sell and deliver Jay's products to retail outlets, driving a company truck to do so. He had to make various records of sales, payments, and the like in a manner prescribed by Jay's.
9. Bill Lockhart (hereinafter "Lockhart") was assigned to train Epperson by taking Epperson on his (Lockhart's route).
10. Lockhart was one of two-driver-salesmen who were always assigned to train new driver-salesmen because they would spend time with them. Lockhart was the one chosen this time because the opening was to be on his route as he was changing to another route in Portage.
11. Lockhart and Kratzenburg had previously decided that it might be good for sales to have a black driver-salesman for that route as Lockhart felt that he had lot sales because he was Caucasian.
12. On Monday, March 24, 1975, Lockhart began training Epperson by taking him out on the route. Lockhart drove the van and made out the sales slips while Epperson observed.
13. On Tuesday, March 25, 1975, Lockhart let Epperson drive and make out the sales slips.

14. By the end of Tuesday Lockhart had concluded that Epperson was having difficulty in driving the van and in properly completing the sales slips.
15. To complete the sales slips, it was necessary to do the following for each product delivered:
 - a. Fill in the quantity (e.g., 3 dozen)
 - b. Post the unit price (e.g., \$1.35 per dozen).
 - c. Extend the price by multiplying the unit price by the quantity (e.g., 3 x \$1.35 = \$4.05).
 - d. Add the column of extended prices to arrive at the total charge to the customer.
16. Although Epperson's performance of this aspect of the job was not as poor as was suggested by Jay's, neither was his performance adequate. More specifically:
 - a. Epperson was usually given the quantity by Lockhart and, therefore could not have been responsible for errors in posting the quantity.
 - b. Epperson knew most of the prices and was given some of the prices he did not know by Lockhart.
 - c. Epperson admitted that he could have made and Lockhart testified that he did make errors in extension (multiplication).
 - d. Epperson admitted and Lockhart testified that he made errors in addition.
17. Epperson and Lockhart discussed the possibility of Epperson purchasing a calculator to cure the errors in extension and addition. However, this idea was apparently dropped after Kratzenburg stated to Lockhart that he felt using a calculator would take too much time and would not solve all of Epperson's problems.
18. there was no evidence that any white (Caucasian) driver-salesman was allowed to use a calculator, that Kratzenburg's statement in opposition to the use of calculator was racially motivated, or that Epperson ever personally discussed the matter with Kratzenburg.

19. In spite of Epperson's testimony that he had no trouble in driving the van other than that he "scratched the gears" a few times, Lockhart's testimony that he had difficulty and was not in control of the van must be credited for the following reasons:
 - a. Epperson stated he had not driven that type and size of truck and that he was not familiar with the gear pattern.
 - b. Lockhart's testimony that Epperson, constantly failed to shift gears until told is credible in view of Epperson's lack of familiarity with the gear pattern.
 - c. Lockhart's personal motivation would have been to have Epperson take over his route so that he could move on to the better paying route in Portage rather than to make reports on Epperson which would cause Epperson to be discharged and cause Lockhart to remain on the route to train another person. Nevertheless, Lockhart did report to Kratzenburg that Epperson could not drive the truck properly.
 - d. Lockhart's testimony that Epperson had difficulty judging distances is credible in view of the fact that Epperson had not driven a truck of that size before.
20. There is no reason to discredit Lockhart's testimony that Epperson's problems with sales slips and driving continued on Wednesday and Thursday.
21. On Thursday night, Kratzenburg, justifiably relying on reports from Lockhart, and based on personal observation of sales slips completed by Epperson, determined that Epperson should be terminated on Friday, March 28, 1975. This decision was approved by Kratzenburg's superior, Mr. Martilla.
22. The reasons listed on Epperson's Termination of Employment form (Respondent's Exhibit #5) are consistent with the above findings in that they are: "Was not able to understand the work involved. Could not add properly, could not drive a truck".

23. A remark made by the bartender at the S&G Tavern on 29th and Calhoun that he “didn’t want a nigger selling him potato chips” had no bearing on the decision to terminate Epperson.
 - a. That account was a very small account.
 - b. The bartender was told by Lockhart that Epperson would be the salesman.
 - c. Jay’s policy and practice regarding such prejudiced customer requests was to stop servicing the account.
24. There was no evidence that Epperson was treated differently than any white driver-salesman trainee by being terminated for inadequate performance in preparing sales slips and driving the truck. To the contrary, the evidence was:
 - a. Lockhart had trained “probably twenty (20)” driver-salesmen who were all white.
 - b. Some of those trainees did not thereafter work for Jay’s because they were not able to handle the job, though he never encountered another trainee with whom he had as much difficulty as he did with Epperson.
25. Because of the absence of an act of unlawful discrimination, Epperson has suffered no damages cognizable under IC 22-9-1.
26. Any Conclusion of Law which should have been deemed to be a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. ICRC has jurisdiction over the subject matter and the parties.
2. The complaint was timely filed.
3. Jay’s is a “person” as that term is defined in IC 22-9-1-3(a).
4. Jay’s is an “employer” as that term is defined in IC 22-9-1-3(h).

5. Epperson failed to meet his burden of proof that Jay's had committed a "discriminatory practice" as that term is defined in IC 22-9-1-3(1) by treating him differently than white driver-salesmen trainees, when he failed to produce any evidence of such disparate treatment.
6. Epperson failed to make a prima facie case of discrimination when he failed to prove that he was adequately performing the job.
7. Even if such a prima facie case had been made by Epperson, it was rebutted when Jay's articulated the non-discriminatory business reasons of sales slip errors and driving difficulties and Epperson failed to prove they were pretextual. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).
8. If, upon all the evidence, it is found that a person has not engaged in an unlawful discriminatory practice or violation of IC 22-9-1, an order dismissing the complaint should be issued IC 22-9-1-6(K) (3).
9. Any Finding of Fact which should have been deemed a Conclusion of Law is hereby adopt as such.

ORDER

The complaint of Complainant, Charley Epperson shall be dismissed for the reasons aforestated.

Signed: July 25, 1979